Supreme Court, U.S.
FILED
SEP 1 - 2004
OFFICE OF THE CLERK

(10) (9)

Nos. 04-104 & 04-105

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDDIE J. BOOKER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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UNITED STATES OF AMERICA,
Petitioner,

v.

DUCAN FANFAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE HONORABLE ORRIN G. HATCH, HONORABLE EDWARD M. KENNEDY, AND HONORABLE DIANNE FEINSTEIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, or to what extent, the Court should give effect to the intent of Congress in enacting the Sentencing Reform Act of 1984 to eliminate the intolerable disparities that had plagued the federal sentencing system by creating an integrated and cohesive sentencing guidelines system.

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INTEREST OF AMICI CURIAE

These cases present the Court with an opportunity to resolve the chaos and confusion that has arisen in the wake of

Blakely v. *Washington*, 124 S. Ct. 2531 (2004), over the continued application of the United States Sentencing Guidelines, and to restore order and certainty to the federal sentencing system.[1] The federal sentencing guidelines system at issue in these cases is the product of the Sentencing Reform Act of 1984 (1984 Act), which was enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837. The 1984 Act represents the most comprehensive effort ever undertaken by Congress to reform the federal sentencing system. It is the product of more than a decade of inter-branch and bipartisan legislative efforts in both Houses of Congress to eliminate the "shameful disparity in criminal sentences" that had long plagued the federal sentencing system and fostered "a disrespect for the law." S. Rep. No. 225, 98th Cong., 1st Sess. 46, 65 (1983).

Amici are a bipartisan group of United States Senators who have been extensively involved with sentencing issues. Senator Orrin G. Hatch is a Republican from Utah. He is the current Chairman of the Senate Judiciary Committee, has served on the Judiciary Committee since 1977, and is one of the original co-sponsors of the bill that became the 1984 Act. See *infra* at 13. Senator Edward M. Kennedy is a Democrat from Massachusetts. He has served on the Judiciary Committee since 1962, and introduced the bill that became the 1984 Act. *Id.* at 14. Senator Dianne Feinstein is a Democrat from California. She is the first woman member of the Senate Judiciary Committee and has served on the Committee since 1994. The Senate Judiciary Committee has legislative jurisdiction over the federal criminal justice system, including sentencing. Members of the Committee have been extensively involved in drafting the 1984 Act, monitoring the

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or part and that no entity other than counsel for amici made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this brief.

operation of the federal sentencing guidelines system, and amending federal sentencing law when appropriate.

Amici support the continued application of the United States Sentencing Guidelines—the centerpiece of the 1984 Act—to eliminate the unwarranted disparities that proliferated under the prior sentencing regime and to foreclose the consideration of race, gender, and other illegitimate factors at sentencing. Amici have a strong interest in defending the constitutionality of the 1984 Act and note that the United States Senate filed a brief in support of the Act in *Mistretta* v. *United States*, 488 U.S. 361 (1989). See Nos. 87-1904 & 87-7028, Br. for U.S. Senate as Amicus Curiae. In addition, if this Court concludes that the enhancement provisions of the sentencing guidelines were not constitutionally applied in these cases, amici have a strong interest in ensuring that the guidelines are not applied in a piecemeal fashion in subsequent cases, but rather are applied—as they were intended to be applied—only as a cohesive and integrated whole.

Amici have a strong interest in promoting order, consistency, and fairness in the federal sentencing system. On July 13, 2004, the Senate Judiciary Committee held a hearing on the potential impact of the *Blakely* decision on the federal criminal justice system, during which the Committee received testimony from federal judges, law enforcement officials, academics, and criminal lawyers. See *Blakely v. Washington and the Future of the Sentencing Guidelines* (transcripts available at http://judiciary.senate.gov/hearing.cfm?id=1260). In addition, amici—along with all their colleagues in the Senate—voted in favor of the Concurrent Resolution that was passed unanimously by the Senate on July 21, 2004, urging this Court to grant certiorari in these cases and "expeditiously to resolve the current confusion and inconsistency in the Federal criminal justice system by promptly considering and ruling on the constitutionality of the Federal Sentencing Guidelines." S. Con. Res. 130 at 4; see 150 Cong. Rec. S8572-S8574 (daily ed. July 21, 2004).

SUMMARY OF ARGUMENT

The Court's resolution of the important issues presented by these cases should be informed by the urgent practical and policy considerations that led to the passage of the Sentencing Reform Act of 1984, the intent of Congress in establishing a federal sentencing guidelines system, and the fundamental values and compromises on which that system rests.

During the 19th century and most of the 20th century, federal sentencing was generally conducted pursuant to an indeterminate system. For most offenses, Congress proscribed a range of punishment that could be imposed for an individual convicted of a particular offense, but judges were free to impose a sentence anywhere within that statutory range based on the consideration of virtually any information that a court deemed relevant with respect to the specific characteristics of the defendant or conduct in which he had engaged. That discretionary sentencing system produced astounding disparities among the sentences that were imposed on defendants convicted of the same offense with similar backgrounds within different judicial districts across the country—and even among different judges in the same district. In addition, studies indicated that the disparities that proliferated under this sentencing system not only were arbitrary, but, in at least some cases, were based on the consideration of race, gender, and other illegitimate factors.

The Sentencing Reform Act of 1984 represents Congress's considered response to that crisis. The 1984 Act reflects more than a decade's worth of reports, hearings, and deliberations on federal sentencing and is the product of an extraordinary coalescence of inter-branch cooperation and bipartisan support in both Houses of Congress. The cornerstone of the Act was the creation of a federal sentencing guidelines system. Sentencing guidelines offered a middle-ground approach between sticking with the failed indeterminate system of sentencing and adopting a rigid system of

determinate sentencing, in which Congress specified applicable sentences for federal offenses and judges simply imposed sentence without any individualized consideration of the offender or his criminal conduct. Under the guidelines system established pursuant to the 1984 Act, district court judges are still free—and, indeed, obligated—to consider available information concerning an offender and his offense, including factors not found by a jury or contained in a plea agreement. But the guidelines *channel* the manner in which a judge may impose sentence based on that information in order to avoid unwarranted disparities in sentencing.

Congress intended the federal sentencing guidelines to be applied as an integrated and cohesive whole. The guidelines establish an interlocking system of calculations and calibrations that are part of a single sentencing equation. In particular, the Congress that enacted the 1984 Act intended sentencing judges to have flexibility to move a sentence both upward and downward within the applicable guidelines range based on an individualized consideration of the offender and his offense and, in unusual cases, to depart upward or downward outside of the guidelines range. Holding that sentencing judges are free to consider facts or circumstances not found by a jury or contained in a plea agreement for purposes of *reducing* a sentence—but not enhancing it—would conflict with Congress's intent in enacting the 1984 Act to ensure that the sentencing guidelines fostered individualized sentencing reflecting aggravating *as well as* mitigating factors found by a judge, and that the guidelines produced sentences that were fair to the offender *as well as* society.

At the same time, in adopting a guidelines system, Congress intended to preserve the traditional role of judges in making the myriad factual determinations that judges—rather than juries—have long made in the course of sentencing defendants in noncapital cases in the federal criminal justice system. Attempting to substitute a sentencing *jury* for a sentencing judge in applying the sentencing guidelines—

even only for the sake of enhancing sentences—would contravene the express terms of the 1984 Act and in all likelihood fundamentally upset the sentencing system established by that Act. Accordingly, that is the sort of reform that should come, if at all, only after careful legislative inquiry and deliberation as to the potential practical and financial costs of attempting to engraft a jury-sentencing system onto the existing sentencing guidelines system, and as to whether more desirable sentencing alternatives exist. In our constitutional system, these sorts of determinations—like the judgment whether to adopt a sentencing guidelines system in the first place—are uniquely suited for legislative consideration and compromise.

Like all Acts of Congress, the 1984 Act is entitled to a strong presumption of constitutionality. The shameful disparities that existed under the prior sentencing system, extensive legislative deliberations on how to avoid such disparities, and strong bipartisan consensus that emerged for adopting a sentencing guidelines system if anything call for even greater caution on the part of this Court in considering the arguments that have been advanced in the wake of *Blakely* for dismantling that considered legislative effort.

ARGUMENT

I. THE INTOLERABLE DISPARITIES THAT PLAGUED THE INDETERMINATE FEDERAL SENTENCING SYSTEM DEMANDED A COMPREHENSIVE LEGISLATIVE RESPONSE

The Constitution does not assign to any one Branch of the National Government the responsibility for federal sentencing—*i.e.*, the authority to determine "the scope and extent of punishment" for the commission of a particular criminal offense. *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989). It is well established, however, that "Congress * * * has the power to fix the sentence for a federal crime," and that "the scope of judicial discretion with respect to a sentence is subject to congressional control." *Ibid.* (citing *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820); *Ex parte United States*, 242 U.S. 27 (1916)); cf. *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (Before a federal court may recognize a criminal offense, "[t]he legislative authority of the Union must first make an act a crime, *affix a punishment to it*, and declare the Court that shall have jurisdiction of the offense.") (emphasis added).

From the First Congress forward, Congress has passed statutes proscribing criminal offenses and fixing the degree of permissible punishment for such offenses. See An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 113-115, 117-118. For much of the first two centuries of our history, however, Congress typically left courts broad leeway to impose sentences on convicted offenders within a statutory range or up to a maximum amount.[2] In exercising that discretion, a sentencing judge was free to consider any aggravating or mitigating circumstances that the judge believed to be relevant to his decision and, after weighing those factors, to select a sentence "within an often broad, congressionally prescribed range." *United States* v. *Grayson*, 438 U.S. 41, 47 (1978); see *id.* at 46. That discretion was not only wide, but, as this Court put it, virtually "unfettered." *Dorszynski* v. *United States*, 418 U.S. 424, 437 (1974).

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[2] In *United States* v. *Grayson*, 438 U.S. 41, 45 (1978), the Court observed that, "[i]n the early days of the Republic, * * * [e]ach crime had its defined punishment." From the First Crimes Act, however, Congress generally set statutory ranges or maximums rather than fixed sentences for federal offenses. See, *e.g.*, Act of April 30, 1790, ch. 9, § 7, 1 Stat. 113 (manslaughter: imprisonment not exceeding three years and a fine not exceeding $1000); *id.* § 22, 1 Stat. 117 (obstruction of process: imprisonment not exceeding one year and fine not exceeding $300). Historically, it was rare for Congress to set fixed terms of imprisonment. See, *e.g.*, Act of Mar. 3, 1853, ch. 104, § 4, 10 Stat. 239 (embezzlement by government employee: imprisonment of two years plus fine).

Under this regime, a sentencing judge could "appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Grayson*, 438 U.S. at 49 (quoting *United States* v. *Tucker*, 404 U.S. 443, 446 (1972)); see also 18 U.S.C. § 3577 (1976) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). Thus, for example, a sentencing judge was free not only to consider information in presentence reports, but to weigh "evidence heard during trial," "the demeanor of the accused," as well as personal " '[i]mpressions about the individual being sentenced—the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts * * * , the degree to which he does or does not deem himself at war with society.'" *Grayson*, 438 U.S. at 50-51 (quoting *United States* v. *Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974) (opinion by Frankel, J.), cert. denied, 423 U.S. 897 (1975)).

At the same time, while appellate jurisdiction initially was available to correct egregious disparities such as unduly harsh sentences, that changed in 1891. Courts interpreted an 1891 statute (Act of Mar. 3, 1891, ch. 517, 26 Stat. 826) to have impliedly repealed appellate jurisdiction over sentencing. See *Freeman* v. *United States*, 243 F. 353, 357 (9th Cir. 1917), cert. denied, 249 U.S. 600 (1919). And soon the "rule" was "firmly established * * * that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Dorszynski*, 418 U.S. at 440-441 (quoting *Gurera* v. *United States*, 40 F.2d 338, 340-341 (8th Cir. 1930)); see *id.* at 441 ("[I]f a judge imposed a sentence within that range, his exercise of discretion * * * was not subject to challenge [on appeal]."). The result was that in the United States—unlike every other " 'nation in the free world' "—"the 'discretion of the judge . . . in (sentencing)

matters [was] virtually free of substantive control or guidance.' " *Id.* at 440 n.14 (quoting law reviews).

By the close of the 19th century, commentators had begun to report on the "gross and startling inequities" that this discretionary system of sentencing produced. *Long v. Short Sentences*, 20 Wash. L. Rep. 135 (1892); see also Carlton T. Lewis, *The Indeterminate Sentence*, 9 Yale L.J. 17, 18 (1900). And early in the 20th century, the Executive Branch reported the problem to Congress. In 1938, Attorney General Cummings informed Congress "that there frequently occur wide disparities and great inequities in sentences imposed in different districts, and even by different judges in the same districts, for identical offenses involving similar states of facts," making "it difficult to maintain that equal, even-handed justice is attained." U.S. Dep't of Justice, *Annual Report of the Attorney General*, 6, 7 (1938). Attorneys General Murphy, Jackson, and Biddle returned to Congress and reiterated that same message. See *id.* at 6 (1939) (Murphy); *id.* at 5-7 (1940) (Jackson); *id.* at 4 (1941) (Biddle).

In 1958, Congress itself took note of the "existence of widespread disparities in the sentences imposed by Federal courts * * * in different parts of the country, between adjoining districts, and even in the same districts." H.R. Rep. No. 1946, 85th Cong., 2d Sess. 6 (1958). Congress responded by authorizing the creation of judicial sentencing institutes and joint councils to formulate advisory "objectives, policies, standards, and criteria for sentencing." 28 U.S.C. § 334(a). These voluntary measures were intended to encourage "[f]ederal judges [to] reach a desirable degree of consensus as to the types of sentences which should be implemented in different kinds of cases." S. Rep. No. 2013, 85th Cong., 2d Sess. 3 (1958). The 1958 statute, however, failed to curb the disparities in federal sentencing. Indeed, one leading authority—Federal Judge Marvin Frankel—went so far as to suggest that "the sentencing institute is almost irrelevant," and that the disparities under the existing sentencing system

were "terrifying and intolerable for a society that professes devotion to the rule of law." Marvin Frankel, *Criminal Sentences: Law Without Order* 5, 66 (1972).[3]

The crisis continued. During the 1970s, a number of empirical studies were issued demonstrating the gross disparities in federal sentencing. For example, a 1972 study undertaken by the United States Attorney's Office for the Southern District of New York determined that "[t]he range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit." S. Rep. No. 225, 98th Cong., 1st Sess. 41 n.21 (1983) (quoting Whitney N. Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163, 167 (1973)). A 1974 study undertaken by the Second Circuit underscored the problem. Fifty district court judges were given the identical files from 20 actual criminal cases and asked to impose a sentence. "The variations in the judges' proposed sentences in each case were astounding." *Id.* at 41; see *id.* at 42-43 (chart summarizing the results of the Second Circuit sentencing study).

Another study undertaken by the Department of Justice asked 208 sitting federal judges to indicate the sentences that they would impose in 16 hypothetical cases, 8 bank robbery cases, and 8 fraud cases. The results were similarly startling:

> In only 3 of the 16 cases was there a unanimous agreement to impose a prison term. Even where most judges agreed that a prison term was appropriate, there was a substantial variation in the lengths of prison terms recommended. In one fraud case in which the mean prison term was 8.5 years, the longest term was life in prison. In another case the mean prison term was 1.1 years, yet the longest prison term recommended was 15 years.

S. Rep. No. 225, *supra*, at 44 (footnotes omitted). Numerous other reports similarly confirmed "the existence of widespread sentencing disparity." *Id.* at 44 n.23 (listing studies). See also *Mistretta*, 488 U.S. at 365 ("Serious disparities in sentences * * * were common" during this period.).

Even more disturbing, studies indicated that the disparity in sentencing was not just arbitrary, but, in at least some cases, the product of judicial consideration of race, gender, and other illegitimate factors. See *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess., Pt. 13, 9047 (1977) (hereinafter *1977 Senate Judiciary Committee Hearings*) ("The statistics are appalling. * * * [W]hen both the crime and the previous history of the offender are held equal, black and minority offenders fare considerably worse.") (testimony of Prof. Alan M. Dershowitz); H.R. Rep. No. 1017, 98th Cong., 1st Sess. 102 (1983) (noting the "potential for sentencing decisions to be based on inappropriate grounds such as race or sex"); see also *Federal Sentencing Revision: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess., Pt. 2, at 1118, 1179 (1984); *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1630 (1988); Arthur W. Campbell, *Law of Sentencing* § 1:3, at 9-10 & nn. 45-46 (2d ed. 1991) (citing studies reporting race- and gender-based disparities).

In short, the evidence overwhelmingly established that the discretionary-sentencing scheme that Congress had embraced, with only relatively minor deviations, for more than a century had generated a "shameful disparity in criminal

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[3] To resolve the sentencing crisis, Judge Frankel proposed the creation of a permanent agency—or commission—composed of judges and experts that would study sentencing and eventually enact "a detailed chart or calculus to be used * * * by the sentencing judge in weighing the many elements that go into the sentence." Frankel, *supra*, at 113.

sentences" and, what is more, "create[d] a disrespect for the law." S. Rep. No. 225, *supra*, at 46, 65. See also H.R. Rep. No. 1017, *supra*, at 31-32 ("Current practices result in widespread disparity among sentences imposed on defendants convicted of similar crimes. * * * Respect for the law cannot flourish among convicted defendants or the public when justice is undercut by unequal treatment.").

II. THE 1984 ACT WAS THE PRODUCT OF MORE THAN A DECADE OF BIPARTISAN AND INTER-BRANCH DELIBERATIONS ON RESOLVING THE SENTENCING CRISIS

Congress responded to that crisis by enacting the Sentencing Reform Act of 1984—one of the most significant legal reforms in American history. The 1984 Act was the culmination of more than a decade's worth of studies, hearings, and thoughtful discussions that have been traced to the Final Report of the National Commission on Reform of Federal Criminal Laws in 1971. See S. Rep. No. 225, *supra*, at 37. The 1971 report was followed by a strong bipartisan effort to reform the federal sentencing system that spanned four presidential administrations, produced bills sponsored by the leading members of both parties in both Houses of Congress, received the support of numerous federal judges and the Department of Justice, and attracted the contributions of the Nation's leading legal academics and practitioners. See *ibid.*; H.R. Rep. No. 1017, *supra*, at 32-34. See Hon. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Federal Sentencing Reporter 180 (Jan./Feb. 1999), 1999 WL 730985 (Vera Inst. Just.), at *1 (noting the "bipartisan fashion" in which Congress acted in passing the 1984 Act).

In 1975, Senator Kennedy introduced a bill (S. 2699) that first proposed the creation of a commission to promulgate sentencing guidelines. See S. 2699, 94th Cong., 1st Sess. (1975). The concept of a sentencing commission was refined by Senators Kennedy and McClellan and included in a more

comprehensive bill to revise the criminal code. See S. 1437, 95th Cong., 1st Sess. (1977). In 1977, the Senate held extensive hearings on the 1971 National Commission Report and the legislative proposals—including the adoption of federal sentencing guidelines—introduced in the wake of that report. See *1977 Senate Judiciary Committee Hearings*, *supra*. During the hearings, Senator Kennedy stressed the importance "of a sentencing commission, which, hopefully, will report back to the Congress with [sentencing] guidelines for various federal crimes." *Id.* at 8578-79. The sentencing reform bill (S. 1437) was reported out of the Senate Judiciary Committee and was overwhelmingly passed by the Senate on January 30, 1978. S. Rep. No. 225, *supra*, at 37.

This sentencing guidelines legislation was carried forward and further refined in the next two Congresses, see S. 1722, 96th Cong., 1st Sess. § 125 (1979); S. 1630, 97th Cong., 1st Sess. § 125 (1981), and reported to the Senate floor with the nearly unanimous support of the Judiciary Committee. The proposals were endorsed by the Attorney General's Task Force on Violent Crime and were included in S. 2572, 97th Cong., 2d Sess. (1982), which passed the Senate on September 30, 1982, by a vote of 95 to 1. S. Rep. No. 225, *supra*, at 37. During this period, similar legislation was reported out of the House Judiciary Committee, see H.R. 6915, *reported by* H.R. Rep. No. 1396, 96th Cong., 2d Sess. (1980), but a stalemate over comprehensive reform of the criminal code prevented passage of the sentencing guidelines law.

In 1983, an even stronger bipartisan consensus emerged on the pending sentencing reform bills. On March 3, 1983, Senator Kennedy introduced S. 668—entitled the "Sentencing Reform Act of 1983"—which was co-sponsored by Senators Thurmond, Biden, Laxalt, Baucus, DeConcini, Hatch, Leahy, Metzenbaum, Simpson, Specter, Abdnor, Hawkins, Cohen, D'Amato, Chiles, Glenn, Huddleston, Lugar, Stevens, Zorinsky, Moynihan, and Sasser. S. Rep. No. 225, *supra*, at 37 & n.3. In his statement introducing

S. 668 to the Senate, Senator Kennedy recounted the urgent need for a comprehensive legislative reform:

> Federal criminal sentencing is in desperate need of reform. * * *
>
> The current system is actually a nonsystem. It is unfair to the defendant, the victim, and society. It defeats the reasonable expectation of the public that a reasonable penalty will be imposed at the time of the defendant's conviction, and that a reasonable sentence actually will be served.
>
> The reforms needed to achieve a workable, rational sentencing system are neither too complicated to legislate, nor too difficult to implement. The legislation which I introduce today clearly articulates the purpose of sentencing, establishes a sentencing commission to develop guidelines for sentencing, abolishes parole, and provides for appellate review of sentences which are outside the guidelines.
>
> Federal sentencing reform has been long overdue.

S. Rep. No. 223, 98th Cong., 1st Sess. 34 (1983) (quoting 129 Cong. Rec. S2090 (daily ed. Mar. 3, 1983)).

Shortly thereafter, Senators Thurmond and Laxalt proposed S. 829 on behalf of the Reagan Administration. S. 829 was a sixteen-title bill proposing a wide-ranging overhaul of the criminal code; Title II of the bill comprised sentencing reform provisions that were essentially identical to those contained in S. 668. S. Rep. No. 225, *supra*, at 37. In addition, Senator Dole proposed a similar sentencing guidelines bill on behalf of the Judicial Conference. Five days of hearings were held on S. 668 and S. 829 (along with certain other criminal law proposals) before the Subcommittee on Criminal Law of the Senate Judiciary Committee. *Ibid.* The Senate Judiciary Committee reported two bills containing identical guidelines provisions to the Senate. See S. 668, *reported by* S. Rep. No. 223, *supra*; S. 1762, tit. II (sentencing reform), *reported by* S. Rep. No. 225, *supra*. Title II of S. 1762 was modeled on Title II of S. 829.

After extended debate, the Senate passed both bills by overwhelming majorities—91 to 1, 130 Cong. Rec. S759 (daily ed. Feb. 2, 1984), and 85 to 3, *id.* at S818-819 (same). After the House of Representatives passed similar sentencing guidelines provisions, see 130 Cong. Rec. H10130-31 (daily ed. Sept. 25, 1984); see H.R. Rep. No. 1017, *supra*, at 37 (bill "mandates the development of sentencing guidelines"); *id.* at 93-105 (discussing guidelines), the Sentencing Reform Act of 1984 was enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837. President Reagan signed the bill into law on October 12, 1984—almost 20 years ago to the day that this Court is scheduled to hear oral argument in these landmark cases.

Since 1984, Congress has continued to monitor this area of law and has made revisions to the sentencing guidelines system through amendments to the 1984 Act and other legislation. Some of these amendments have been criticized on the grounds that they depart from the values of the 1984 Act. The basic challenge leveled in these cases to the operation of the sentencing guidelines, however, cuts to the core of the guidelines system established by the 1984 Act.

III. THE CENTERPIECE OF THE 1984 ACT WAS THE ADOPTION OF A COMPREHENSIVE SENTENCING GUIDELINES SYSTEM

The cornerstone of the 1984 Act—and the key to Congress's effort to eliminate "unwarranted sentencing disparity"—was the creation of "a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently." S. Rep. No. 225, *supra*, at 51-52; *id.* at 168 (provision calling for the creation of "a detailed set of sentencing guidelines * * * is of major significance"). The sentencing guidelines represented a compromise between adhering to the failed indeterminate

sentencing system in which judges had enjoyed essentially "unfettered sentencing discretion" (*Dorszynski*, 418 U.S. at 437) and moving to "a determinate sentencing system * * * of specific legislative sentences" (S. Rep. No. 225, *supra*, at 62) devoid of any individualized judicial consideration of the particular offender or offense characteristics. See *id.* at 78-79; *Developments in the Law*, *supra*, at 1638 ("Sentencing guidelines represent a compromise between the extremes of pure determinate and indeterminate sentencing: they guide the judge's discretion but permit some flexibility.").

The 1984 Act thus created the Sentencing Commission as an "independent commission in the judicial branch," 28 U.S.C. § 991(a), and charged it with "establish[ing] sentencing policies and practices for the Federal criminal justice system" that serve the objectives of the 1984 Act, 28 U.S.C. § 991(b)(1). Congress directed the Commission, *inter alia*, to "provide certainty and fairness" in sentencing and "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted." 28 U.S.C. § 991(b)(1)(B). To achieve that objective, Congress directed the Sentencing Commission to promulgate sentencing "guidelines" that serve the goals of the 1984 Act, 28 U.S.C. § 994(a)(1), and to establish "sentencing range[s]" applicable "for each category of offense involving each category of defendant," 28 U.S.C. § 994(b)(1). See *Mistretta*, 488 U.S. at 374-375 (discussing the detailed nature of Congress's delegation of authority to the Sentencing Commission).

The Sentencing Commission spent more than a year canvassing U.S. sentencing practices—during which it held public hearings, convened working groups of federal judges, prosecutors, private defense attorneys, and academics, reviewed more than 500 sets of written comments that were submitted to it, and examined thousands of criminal sentence reports—in an effort to identify and assign weights to the

factors that judges had traditionally used in sentencing. See 28 U.S.C. § 994(m); U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16-17 (1987). After publishing and receiving and reviewing written comments on two separate sets of proposed sentencing guidelines, the Commission promulgated final guidelines that went into effect on November 1, 1987. Those guidelines are continuously reviewed and revised by the Commission—which remains "fully accountable to Congress." *Mistretta*, 488 U.S. at 393-394 (The Sentencing Commission is "fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit.").[4]

The sentencing guidelines system created by the 1984 Act seeks to strike a balance between two compelling policy concerns. The first is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(7). The second is the recognition that "[s]ome variation in sentencing is not only inevitable but desirable," because "each offender stands before a court as an individual, different in some ways from other offenders," and an offense of conviction "may have been committed under highly individual circumstances." S. Rep. No. 225, *supra*, at 150.

To avoid unwarranted sentence disparities, Congress directed the Sentencing Commission to establish a system of sentencing guidelines detailing the generally applicable range of punishment that is available with respect to an offense of conviction and requiring judges to sentence defendants pursuant to those guidelines "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing

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[4] Congress has periodically exercised that authority, including recently, through certain provisions of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(b), (g), and (*i*), 117 Stat. 668-669, 671-673 (Apr. 30, 2003).

Commission in formulating the guidelines and that should result in a [different] sentence." 18 U.S.C. § 3553(b) (1986). Congress "expected that most sentences will fall *within* the ranges recommended in the sentencing guidelines," but also stressed that "the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence *outside* the guidelines in an appropriate case," S. Rep. No. 225, *supra*, at 52, 150 (emphases added).

To ensure that the sentencing guidelines do not foreclose "thoughtful imposition of individualized sentences," S. Rep. No. 225, *supra*, at 52, Congress not only permitted departures from the guidelines in extraordinary situations, but more fundamentally, stressed that, "[u]nder a sentencing guidelines system, the judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender." *Id.* at 53. The 1984 Act accordingly specifies numerous factors that "[t]he court, in determining the particular sentence to be imposed, shall consider," including "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. §§ 3553(a) and (a)(1).

The Senate Judiciary Committee elaborated as follows:

> [T]he judge must consider such things as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor way, and whether there were any particular aggravating or mitigating circumstances surrounding the offense. With respect to the history and characteristics of the defendant, the judge must consider such matters as the criminal history of the defendant, as well as the nature and effect of any previous criminal sanctions. All of these considerations and others that the judge believed to be appropriate would assist him in assessing how the sentencing guidelines and policy statements should apply to the defendant.

S. Rep. No. 225, *supra*, at 75; see *id.* at 52 ("[T]he sentencing judge has an *obligation* to consider all the relevant factors in a case" before imposing a sentence) (emphasis added).

In making that determination, the sentencing judge is not limited to facts found by a jury or contained in a plea agreement, but rather is directed to consider the same type of information that judges have traditionally relied on in making sentencing determinations, including, perhaps foremost, "a presentence report that notes the presence or absence of each relevant offense and offender characteristics." S. Rep. No. 225, *supra*, at 53. Indeed, the 1984 Act recodified the general rule that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence." 18 U.S.C. § 3661; see U.S. Sentencing Guideline § 1B1.4 cmt.; *United States* v. *Watts*, 519 U.S. 148, 151-152 (1997) (per curiam). Unlike the prior indeterminate sentencing scheme, however, the sentencing guidelines *channel* the manner in which the sentencing court may make sentencing decisions based on such information in order to avoid the intolerable disparities that plagued the indeterminate sentencing regime, and limit the degree to which a judge may depart upward or downward within a sentencing range based on such information.

At the same time, Congress specifically directed the Commission to "assure that the guidelines * * * are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d). The Senate Judiciary Committee "added th[at] provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in [the Act] to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence." S. Rep. No. 225, *supra*, at 171. The sentencing guidelines

thus explicitly state that "Race, Sex, National Origin, Creed, Religion, and Socio-economic status * * * are *not* relevant in the determination of a sentence." U.S. Sentencing Guidelines § 5H1.10 (emphasis added). As an additional check to ensure that sentencing determinations are not based on such illegitimate considerations, courts are required to give written reasons for their sentencing decisions. See 18 U.S.C. § 3553(c); S. Rep. No. 225, *supra*, at 79-80; see also *Developments in the Law*, *supra*, at 1641 ("sentencing guidelines * * * place institutional checks on invidious discrimination").

Thus, while the 1984 Act sought to channel the discretion of sentencing judges in order to assure greater fairness and equality in sentencing, the Act nonetheless sought to preserve the traditional discretion that the sentencing judges have exercised to consider background information that they deem relevant to their sentencing decision. See *supra* at 8. As the Judiciary Committee stressed, "[t]he purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences" based on "a comprehensive examination of the particular offense and the particular offender." S. Rep. No. 225, *supra*, at 52-53. The ranges set by the guidelines establish a *structure* designed to avoid unwarranted disparities, but the guidelines permit sentencing judges to *individualize* sentences within those ranges by adjusting sentences both upward and downward based on particular offense and offender characteristics.

All sentences imposed under the guidelines, however, ultimately must conform to the minimum and maximum punishments prescribed by Congress and set forth in the United States Code. See U.S. Sentencing Guidelines § 5G1.1. Nothing in the 1984 Act or the sentencing guidelines authorizes the imposition of a sentence for an offense of conviction that deviates from a statutory maximum or minimum set by Congress for a particular offense.

IV. THE SENTENCING GUIDELINES WERE INTENDED TO OPERATE AS AN INTEGRATED SYSTEM OF CALIBRATIONS AND BASED ON JUDGE-MADE DETERMINATIONS

Congress intended the federal sentencing guidelines to be applied as a cohesive and integrated whole. As Congress made clear in enacting the 1984 Act, the sentencing guidelines system reflected a "comprehensive plan" to reform sentencing. S. Rep. No. 225, *supra*, at 46; see *id.* at 150 (1984 Act introduced a "systematized sentencing system"). The 1,000-plus page *Federal Sentencing Guidelines Manual* that implements the 1984 legislation amply demonstrates the "comprehensive" nature of the sentencing guidelines system that Congress created. Moreover, as the various charts and sentencing table contained in the *Manual* underscore, the sentencing guidelines establish an interlocking system of calculations and adjustments that are part of a single sentencing equation. See S. Rep. No. 225, *supra*, at 168 ("The result [of Commission's determinations] should be a complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results."). The sentencing guidelines are explicitly predicated on that comprehensive approach. See U.S. Sentencing Guidelines § 1B1.11 ("The Guidelines Manual in effect on a particular date shall be applied *in its entirety*.") (emphasis added).

Attempting to apply the sentencing guidelines in a piecemeal fashion not only would be inconsistent with the "systematized sentencing system" (S. Rep. No. 225, *supra*, at 150) that Congress intended to create, but would upset the many compromises struck in fashioning the guidelines. As Justice Breyer has explained, the sentencing guidelines are the product of numerous compromises that balance "the practical needs of administration, institutional considerations, and the competing goals of a criminal justice system." Hon.

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra 1, 2 (1988); see *id.* at 28 ("The Guidelines create a final set of compromises concerning the problems endemic to the criminal justice system."); *id.* at 32 ("[W]hile it may be possible to focus on a *single* aspect of the current Sentencing Guidelines and suggest ways to improve upon them, such an enterprise may be unproductive unless it properly accounts for the changes that would result *elsewhere in the system*.") (emphasis added). Indeed, as Justice Breyer has detailed, "compromise * * * permeates the Guidelines." *Id.* at 2.

In particular, the Congress that enacted the 1984 Act did not conceive of—much less establish—a sentencing guidelines system in which sentencing judges were free to consider facts or circumstances not found by a jury or admitted in a plea agreement for the purpose of adjusting a base-offense level *down*, but not *up*, within the applicable guidelines range. Such a one-way lever would be grossly at odds with Congress's intent. In establishing the guidelines system, Congress made clear that a sentencing judge should take into account aggravating *as well as* mitigating factors. See 28 U.S.C. § 994(c)(2) (directing the Sentencing Commission to consider "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense"); S. Rep. No. 225, *supra*, at 74 (The Act "requires the court to impose sentence within the sentencing guidelines unless an aggravating or mitigating circumstance exists that was not adequately considered in the formulation of the guidelines and that should result in a different sentence.").

Moreover, such a one-sided system would conflict with Congress's objective of ensuring that the sentences produced under the guidelines system would be "fair both to the offender *and* to society." S. Rep. No. 225, *supra*, at 39 (emphasis added); *id.* at 45-46 ("a sentence that is unjustifiably low is * * * unfair to the public"). And, to the extent that the base-offense level could be adjusted in only one direction—downward—based on individual or offense characteristics found by a judge, the guidelines would transgress Congress's intention of "actually *enhanc[ing]* the individualization of sentences as compared to current law." *Id.* at 52-53 (emphasis added). Permitting sentencing judges to consider specific offender or offense characteristics not found by a jury to reduce a sentence—but not enhance it—would produce sentences that do not reflect a full and accurate profile of the individual before the court and, therefore, are not based on a proper evaluation of the "fairness and appropriateness of the sentence for [that] offender." *Ibid.*

Subjecting the enhancement side of the guidelines equation to a jury-factfinding or plea-admission requirement also would fundamentally upset the scheme that Congress enacted. To begin with, the 1984 Act specifies that the sentencing guidelines are "for use *of a sentencing court* in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1) (emphasis added); see U.S. Sentencing Guidelines § 6A1.3(b) cmt. Moreover, Congress intended that the findings necessary for the operation of the guidelines typically would be made by the court in performing that sentencing role. Indeed, in reporting the Act to the Senate, the Judiciary Committee observed that "*the sentencing judge* has an *obligation* to consider all the relevant factors in a case" before imposing a sentence. S. Rep. No. 225, *supra*, at 52 (emphases added). See *ibid.* ("The bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing."); *id.* at 53 ("Under a sentencing guidelines system, the judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender."); *id.* at 75 (discussing the myriad of "factors a judge is required to consider in selecting the sentence").

Furthermore, attempting to substitute a jury for the sentencing judge in applying the sentencing guidelines—even just

for purposes of finding facts that could result in sentencing enhancements—would require consideration of a number of potentially serious practical issues. For example, new rules might be required to bifurcate previously routine criminal trials into a guilt phase and a sentencing phase, complex new jury instructions might be required to cover the lexicon of specialized guidelines terms and concepts that would now have to be considered by a jury in evaluating sentencing factors, and elaborate special verdicts might become necessary. See *2004* Blakely *Hearings*, *supra* (statement of Prof. Frank Bowman) (available at http://judiciary.senate.gov/testimony.cfm?id =1260&wit_id=647). All of this could revamp the ordinary federal criminal trial, create a host of new and complex legal issues for the courts, and place a significant if not potentially crippling practical and financial drain on the federal criminal justice system. At a bare minimum, such a possibly far-reaching and costly overhaul of the federal criminal process should come only from the hand of Congress. In enacting the 1984 Act, there is no evidence that Congress considered any such consequences.[5]

But that is not surprising. In enacting the 1984 Act, Congress had no intention of shifting the responsibility for imposing sentence—including the responsibility for making the sorts of myriad factual determinations that judges have for centuries made in the course of imposing sentence—from sentencing judges to sentencing *juries*. To the contrary, as this Court aptly observed in its first exposure to the 1984 Act, the sentencing guidelines "do no more than fetter the discretion of sentencing judges to do what they have done for

[5] Indeed, although Congress took care to amend specific provisions of the Federal Rules of Criminal Procedure "in order to accord with the provisions [of the 1984 Act]," S. Rep. No. 225, *supra*, at 157-158 (discussing provisions providing for the appellate review of sentences), Congress did not alter the federal rules governing the use of juries in federal criminal trials.

generations—impose sentences within the broad limits established by Congress." *Mistretta*, 488 U.S. at 396.[6]

* * * * *

Determining the appropriate scope of punishment for an offense is one of the most complex areas of criminal law. It is the product of a delicate—and at times potentially volatile—mix of policy, practical, and societal considerations. It is, in short, an area uniquely suited for legislative consideration and compromise. The 1984 Act is the result of the most careful examination that Congress and, indeed, all three Branches collectively have ever devoted to the federal sentencing system. The Act sought to eliminate the gross disparities that had proliferated under the prior indeterminate sentencing system—disparities that in at least some cases were believed to stem from the improper consideration of race and other illegitimate factors. Nearly two decades later, debate is ongoing in the Halls of Congress and the other Branches on ways of improving the sentencing system, but—especially when viewed against the backdrop of the intolerable state of affairs that existed before 1984—bipartisan support continues to exist for the basic structure of the sentencing guidelines system created by the 1984 Act and the

[6] The understanding that judges—and not juries—would engage in the factfinding necessary to administer the guidelines was reaffirmed before the initial set of guidelines went into effect on November 1, 1987. In House subcommittee hearings, witnesses discussed that the guidelines would call for judicial factfinding, by a preponderance of the evidence, to resolve contested issues at sentencing, and debated the effect on judicial efficiency and fairness. See *Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 659, 799 (1987). But there was no suggestion that the guidelines would be administered through jury factfinding, and no legislation adopted to provide for it, even though one witness suggested that Congress should consider it. See *id.* at 814 n.3 (testimony of Judge Edward R. Becker) ("commend[ing] to the Congress' attention the use of the jury to make critical fact findings that bear upon sentencing").

core principles on which it rests. In our representative Republic, only the clearest constitutional command should be cause for dismantling such a considered legislative effort.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to give effect to Congress's intent in enacting the 1984 Act and sustain the continued application of the federal sentencing guidelines as a cohesive and integrated whole.

Respectfully submitted,

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